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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 548

MEYER GORDON,

Petitioner,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No.

MEYER GORDON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices:

Meyer Gordon, petitioner, prays for the issuance of a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered December 5, 1949, in this cause, that Court's number 10, 850 (Tr. 332), which affirmed a judgment of the District Court of the United States for the Eastern District of Michigan (Tr. 342) denying the petitioner's Motion for a New Trial on the basis of newly discovered evidence, and denying the petitioner's Motion for an order vacating the judgment (Tr. 304).

The petitioner also prays for a writ of certiorari to review the action of the United States Court of Appeals

for the Sixth Circuit in denying the petitioner's Motion filed in that court to remand the case to the District Court for reconsideration of his Motion for a New Trial, which motion was based upon new and additional evidence discovered after the original hearing in the United States District Court.

The opinion of the Court of Appeals appears in the record herein (Tr. 333-343) and is not yet reported. No opinion was rendered on the Petitioner's Motion to Remand. The court's order denying said motion, however, was entered Jan. 3, 1950 (Tr. 344-45).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED. [1]

Petitioner, who is now incarcerated in a Federal penitentiary in consequence of two consecutive sentences of 10 years each imposed upon him in 1946 by the District Court for the Eastern District of Michigan for alleged violations of the National Stolen Property Act (U.S.C.A., Title 18, Sections 415 and 418A), filed in that Court in 1948 the instant Motion for a New Trial upon the ground, fully discussed in the Brief in Support of this Petition, that one Herman Frank Banning, the principal witness upon whose testimony petitioner was convicted has repeatedly recanted his testimony, that there now exists affirmative and undisputed proof that Banning perjured himself with the knowledge of Government officials as to matters vital to the petitioner's conviction and that petitioner can now produce four witnesses, each of whom was unavailable to him at the time of his trial either because the witness was absent from

[1] A concise but full narration of the facts appears in the *Statement of the Case in the Brief in Support of this Petition*, post, (pp. 15 to 27). The instant statement is confined to a very terse indication of the nature of the case and of the questions presented.

the jurisdiction or had a privilege against self-incrimination, whose testimony will exonerate petitioner. The affidavits of Banning and four other witnesses were appended to petitioner's motion.

The District Court denied petitioner's motion. The Court, however, explicitly stated:

> (1) "I think that the Government's case must rest or fall on Banning, all of it."
>
> (2) "If that testimony" [Banning's testimony implicating petitioner and now recanted] "hadn't been here, Gordon could never have been convicted. I don't think I would even let it go to the jury because if he had not seen the man, there was no connection of Gordon with this case, except that incident in the hotel." (Tr. 204.)
>
> (3) That the newly discovered evidence was of such a character that "**There couldn't be a jury in the world found now to believe Banning, and anybody that knows anything about trials knows that. Nobody would believe Banning now, no jury would** . . . So if I let Mr. Meyer Gordon out, I let him out. If there is a new trial, there isn't a chance of [his] ever being convicted." (Tr. 231.)
>
> (4) That "**I didn't necessarily believe Banning . . . I have never at any time said I believed Banning, have I, at any place?**" (Tr. 226.)

Thus the Trial Judge explicitly found (1) that Banning's testimony was essential to petitioner's conviction, (2) that no jury would now convict petitioner, and (3) that the Trial Judge himself "did not necessarily believe Banning".

Nothwithstanding these explicit findings in favor of petitioner, the District Judge denied the Motion for a New Trial.

While petitioner's motion was under the Trial Judge's advisement, the Judge, without the knowledge, much less the consent of counsel for either petitioner or the Govern-

ment, made a personal trip to the penitentiary at Columbus, Ohio, there privately interviewed one Sidran, one of the witnesses who is now willing to testify in exoneration of the petitioner, obtained Sidran's confirmation of his affidavit exculpating petitioner, then, likewise without the knowledge or consent of counsel for petitioner or the Government, privately consulted with FBI officials as to the truth of Sidran's exoneration of petitioner and reflected in the record his conclusions based upon these extrajudicial conferences and interviews by stating, "There goes Sidran's affidavit," (Tr. 223).

Although the Trial Judge was willing thus to interview Sidran and FBI officials privately and without the knowledge of counsel in the case, he refused to hear in open court the testimony of any of the witnesses tendered by petitioner as now willing to exonerate him.

The Court of Appeals, overruling petitioner's contention that the Trial Judge's findings entitled him to a new trial and that in any event the Trial Judge's extrajudicial interviews of Sidran and FBI agents entitled petitioner to a reversal of the order denying the Motion for New Trial, has affirmed the denial of a new trial in this case.

The evidence of Banning's perjury with respect to his motivation in testifying against petitioner, set forth in full substance in *Brief in Support of this Petition, post,* and merely indicated here, was that although Banning swore that he had no ulterior reason for implicating petitioner, shortly after petitioner's conviction Banning received the following rewards: (1) the procurement of a pardon from a 20 year sentence he was then serving, (2) dismissal of another indictment for robbery pending against Banning at Cleveland, (3) permission to go at large upon his own recognizance despite his plea of guilty to the

crime for which petitioner was convicted, (4) the procurement of a job for him by Government officials, and (5) as disclosed by appellant's Motion to Remand, discussed *post*, the procurement of the dismissal of a State information for robbery pending against Banning at Omaha upon the representation that he had been "useful" to the Government in convicting appellant. Sundry lesser favors were also bestowed upon him while he was awaiting Gordon's trial. (See *Brief in Support of this Petition, post.*)

Thus there is now no doubt that Banning lied in denying on petitioner's trial that he expected reward for the testimony on which, as both the Trial Court and the Court of Appeals have declared, petitioner's conviction rests. Nor can the Government be supposed to have been without knowledge that his disclaimer of hope of reward was false, particularly in view of the fact that it is undenied that the FBI agent in charge of the case prior to trial made a bet with Banning that Banning would be out if petitioner was convicted. (See opinion of Court of Appeals (Tr. 336-37).) This was not denied.

Banning also disclosed that twice before the trial and while he was at Leavenworth two F.B.I. agents visited him, told him that they were trying to get evidence against Gordon, that if he would cooperate he and his wife would not be indicted at Fort Wayne on a robbery charge, and that nothing would happen to his wife and "it would do me a lot of good." This, likewise was not denied. (Tr. 185.)

Petitioner also presented to the Court of Appeals a Motion for Remand in the light of still more recent discoveries of rewards granted to Banning for his testimony against petitioner. This evidence, discovered while peti-

tioner's present appeal was pending in the Circuit Court of Appeals, disclosed that an additional reward for his testimony convicting petitioner had been granted to Banning when the United States Attorney at Detroit had requested the County Attorney at Omaha, Nebraska, to dismiss another indictment for robbery pending there against Banning, and procured such dismissal upon the representation that Banning had been "useful" to the Government in convicting the petitioner. Government affidavits disclosed this to be true, despite the fact that the Government officials, upon demand, refused to disclose the correspondence leading up to this dismissal. The Court of Appeals, however, without opinion, denied the petitioner's motion for remand, although the evidence had never been available to the lower court, since it was not discovered until after the case was pending on appeal.

Jurisdiction.

This Court has jurisdiction under Section 1254(a) of Title 28, enacted June 25, 1948, and by virtue of alleged violations of the United States Constitution, and under Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

The Questions Presented.

The questions presented are:

I.

The Trial Court made explicit findings (1) that Banning's testimony was essential to petitioner's conviction, (2) that no jury would now believe Banning or convict petitioner, and (3) that the Trial Judge "did not necessarily believe Banning." Nevertheless the Trial Judge refused a new trial.

Did these findings entitle petitioner to a new trial under the applicable rules governing new trials on the ground of newly discovered evidence? [Cf. *Griffin* v. *United States*, 336 U. S. 704, discussed *post*.]

II.

Did the Trial Judge's conduct in secretly interviewing Sidran and FBI agents constitute such a departure from the norms of due process and fair hearing as to entitle petitioner to a reversal of the order denying his Motion for a New Trial?

> [Cf. *Williams* v. *New York*, 337 U. S. 241, where this Court, speaking specifically of extra-judicial matter not comprising a part of the record, said, "Tribunals passing on the guilt of a defendant have always been hedged in by strict evidentiary procedural limitations," and *People* v. *Cooper*, 398 Ill. 468, declaring that "Any private investigation by a Court pending a Motion for a New Trial constitutes a denial to the defendant of the constitutional guarantee of due process of law." And that this is so regardless of the result of such an investigation.]

III.

Did the refusal of the District Court to hear in open court the witnesses now available to the petitioner, coupled with the Trial Judge's willingness to interview Sidran and the FBI agents secretly, constitute such a denial of petitioner's rights, constitutional or implicit in the ordinary canons of judicature in Federal criminal cases, as to entitle petitioner to a reversal?

IV.

On petitioner's trial the Government sat by while Banning testified that he had no ulterior motive for testifying against petitioner. On that trial the Government argued that "Banning has been promised nothing" (Tr. 39-39) and that he "faces twenty years" in this case and another "10 years at Cleveland." Shortly after petitioner's conviction, Banning received the *largesse* indicated in the *Summary and Short Statement of the Matter involved, ante.* The Trial Court on the motion for a new trial found that in fact Banning had hope of reward when he testified, notwithstanding the Government's protestations to the contrary on petitioner's trial. The Court stated he was "not naive enough to believe" that Banning expected no reward for convicting petitioner by his testimony. (Tr. 235-36).

Did the Government's conduct in arguing that Banning was a disinterested witness when it is now apparent that the Government must have known that he was not such, violate those principles of fairness enjoined upon courts and prosecutors by the Constitution or this Court's principles of criminal jurisprudence? (See *McNabb* v. *U. S.*, 318 U. S. 332.)

V.

Did the action of the Circuit Court of Appeals in summarily deciding, without opinion, not to remand the case to the District Court for a reconsideration of petitioner's motion constitute reversible error when the motion to remand disclosed that Banning had been given another reward for his testimony implicating petitioner in that, after petitioner's conviction, the United States Attorney

had requesed the dismissal of a State information for robbery pending against Banning at Omaha, and had represented that Banning had been "useful" to the Government in convicting petitioner? This evidence had not been available or considered by the Trial Court in the original hearing. It had been suppresed by the Government's refusal to produce its correspondence.

VI.

Is a motion for a new trial based upon newly discovered evidence partially consisting of recantations a matter *solely* for the discretion of the Trial Court, as indicated in the opinion of the Court of Appeals, or is the criterion for adjudication whether a jury would reasonably be expected to acquit in the light of the new evidence, as held in the 3rd and 9th Circuits (cf. *U. S.* v. *Ward*, 168 F. (2d) 226, (CCA 3); *Cleary* v. *U. S.*, 163 F. (2d) 748, (CCA 9). See also *Griffin* v. *U. S.*, 336 U. S. 704 and *Helwig* v. *U. S.*, 162 F. (2d) 837 (CCA 6).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

Reasons Grounded Upon the Trial Court's Finding That "No Jury Would Now Believe Banning" and That the Trial Judge "Did Not Believe Him", Both the Trial Court and the Court of Appeals Having Declared That Credence in Banning's Testimony Was Essential To a Conviction.

This case raises questions of importance throughout the Nation concerning the proper canons of judicature on motions for new trial on the ground of newly discovered evidence in criminal cases.

Both the Trial Court and the Court of Appeals have declared that credence in Banning's testimony is essential to a conviction of petitioner. The record presents the Trial Court's explicit findings that no jury would now believe Banning and that the Trial Judge "did not necessarily believe him".

The Trial Judge has a very wide measure of discretion when the matter is one of believing or not believing a witness or conceiving what a jury would or would not do with newly discovered evidence (*U. S.* v. *Johnson,* 327 U. S. 106). But in this case the Trial Judge declared positively that no jury would now convict petitioner and that he himself did not "necessarily believe Banning". (Tr. 226.)

We read *Griffin* v. *United States,* 336 U. S. 704, as teaching that where a Trial Judge concludes that a *jury* would acquit in light of newly discovered evidence, it is his duty to grant a new trial regardless of his own belief as to the guilt or innocence of the defendant. If we are correct in thus understanding the *Griffin* case, the Court of Appeals'

decision is so clearly in conflict with this Court's applicable holding in that case as to call for the exercise of this Court's power of supervision.

But if the *Griffin* case leaves it doubtful whether the judicial criterion on a motion for new trial is the Trial Court's view of what a jury would do or is his own belief as to a defendants' guilt or innocence notwithstanding the new evidence, then the question is an important one that has not been but should be settled by this Court.

In the *Brief in Support of This Petition, post,* it is shown that there is a diversity of opinion among Courts of Appeals and other Courts of high authority as to whether the question upon a motion for new trial on the ground of newly discovered evidence is,

> Does the *Trial Judge himself* believe the newly discovered evidence.

or whether the question is

> Does the Trial Judge believe that a *jury* would probably believe it?

This problem is basic in criminal jurisprudence. If it has not been settled clearly in petitioner's favor by the *Griffin* case, it should elicit this Court's writ of *certiorari.*

Reasons Grounded Upon the Trial Court's Secret Interview of a Material Witness and His Subsequent Consultation of FBI Agents.

Another very important question is raised by the Trial Court's private interview of witnesses without the knowledge or consent of counsel for either side. The Court of Appeals for the Sixth Circuit finds no denial of due process in this action on the part of the Trial Court. The Supreme

Court of Illinois, however, has flatly declared in *People* v. *Cooper*, 398 Ill. 468, 472:

> "In short, *any* private investigation by a court pending a motion for a new trial constitutes a denial to the defendant of the constitutional guarantee of due process of law."

In *People* v. *McGeoghegan*, 325 Ill. 337, the Supreme Court of Illinois reversed a denial of a motion for a new trial where the Trial Judge sent his bailiff to interview a material witness *although the bailiff's report of the interview was favorable to the accused.* The Court held that such extra-judicial interviews in connection with motions for new trial in criminal cases deny *per se* basic rights.

There is thus a substantial conflict between the holding of the Court of Appeals in the instant case, which undertakes to search the mind of the Trial Judge and finds that it was not infected by these extra-judicial interviews, and the decision of the Supreme Court of Illinois holding categorically and peremptorily that the mere conduct of such an interview, regardless of its outcome or result, denies due process *per se.*

Petitioner therefore submits that this case propounds important questions of constitutional law and criminal jurisprudence in Federal Courts which ought to be decided by this Court, and presents a conflict between the *rationale* of the Court of Appeals' opinion in the instant case and the declaration of the Supreme Court of Illinois that extra-judicial investigations such as that involved in this case automatically deny due process.

Wholly apart from any conflict in the declarations of lower courts, the practice of secret interviews by a Trial Judge of material witnesses is, we think, a clear denial of due process of law. But if such a revolutionary technique

of judicial investigation is licit, it should have the explicit approbation of this Court.

Reasons Grounded Upon the Contention that the Government's Conduct in this Case, as Disclosed by the Present Newly Discovered Evidence, Violated the Fundamental Canons of Fair Play.

The Government's conduct in permitting Banning to disclaim ulterior motives for implicating petitioner and the prosecutor's conduct in arguing to the jury that Banning was "facing another 20 years by his plea of guilty in the instant case and another 10 years at Cleveland" (Tr. 38-39) when, as is now apparent, Banning had the most tangible hope of the complete amnesty which he so shortly received was, we submit, such as to raise the substantial question, stated as Question IV, *supra,* as to whether the Government has transgressed the fundamental rules of fairness required in the administration of criminal justice.

Reasons Grounded Upon the Court of Appeals' Refusal to Remand Upon the Suggestion in that Court of Still More Recently Discovered Evidence.

The Court of Appeals' denial without opinion of the petitioner's motion in that Court for remand on the ground of still further rewards to Banning, summarized *ante,* raises an important question as to the function of the Court of Appeals in the administration of Federal criminal jurisprudence in cases such as this one.

Reasons Grounded Upon the Total Complex of Facts of Question of Denial of Due Process or the Serious Departure From the Principles of Criminal Jurisprudence.

Petitioner respectfully submits the Trial Court's denial of his motion, when viewed in the light of the totality of the facts in this record and with particular regard to the Court's willingness to interview a witness secretly, but his unwillingness to have any of petitioner's witnesses called before either the court or a jury, raises questions of sufficient importance to evoke certiorari.

PRAYER FOR GRANTING THE CERTIORARI.

Wherefore, petitioner respectfully prays this Court's Writ of Certiorari to review and reverse the judgment of the Court of Appeals for the Sixth Circuit in this case.

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BRIEF IN SUPPORT OF PETITION.

STATEMENT OF THE CASE.

The *Summary and Short Statement of the Matter Involved, ante,* is a brief indication of the nature of the case, of the questions emerging from the record, and of their importance—This Statement sets forth the full substance of the matters relied upon for *certiorari* and reversal.

On May 23, 1946, the petitioner was sentenced by the District Court for the Eastern District of Michigan, to two consecutive terms of 10 years each and to two separate fines of $10,000 each for alleged violations of the Stolen Property Act (U.S.C.A. Title 18, Sections 415 and Section 418 (a)). He has been incarcerated in consequence of this stence since February 19, 1948. On December 8, 1948, the Court of Appeals for the Sixth Circuit, having before it only the record made at the trial and not having cognizance of the important matters now undisputed on the presently standing record, affirmed. *Gordon* v. *United States,* 164 F. 2d 855.

This Court denied certiorari. See *Gordon* v. *United States,* memorandum order, 320 U. S. 798.

Petitioner has never been accused of physical participation in or presence at or near the larceny of which he is convicted. That crime was committed by Banning and confederates in a hotel room in Detroit, from which they stole various articles of jewelry left in the room by one Ollendorf, a jewelry salesman. Petitioner's complicity was supposed to have consisted in his acting as a "fence" for

Banning, petitioner having allegedly financed this and other crimes of Banning's and the latter's associates, and in that wise having acting as an accessory. (*Original Opinion of the Court of Appeals*, pp. 857-8).

Both the Trial Judge and the Court of Appeals have explicitly recognized that credence in Banning's testimony was essential to petitioner's conviction.[3] No person other than Banning has ever named petitioner as a recipient of any part of the stolen jewelry in question.[4]

On May 19, 1948, pursuant to Rule 33 of the Rules of Criminal Procedure, the petitioner filed his motion in the District Court for a new trial upon the grounds that:

> (1) Banning, whose testimony both the Trial Court and the Court of Appeals had explicitly recognized as essential to appellant's conviction, had repeatedly recanted his testimony since the petitioner's conviction in matters both vitally material and jurisdictional.
>
> (2) There now exists affirmative and undisputed proof that Banning perjured himself on the trial to the knowledge of Government officials when he testified that he had no ulterior inducement to incriminate the petitioner, and that he had neither been promised anything, nor had he been thinking about it, nor had he any hopes that by giving the Government the "information" he could make a deal. This evidence consisted of proof that soon after Banning's implication of petitioner he had received (a) A pardon from the

[3] The Court of Appeals said at page 857 of its original Opinion: "The conviction" (of appellant in this case) "was based principally upon the testimony of Herman Frank Banning, a co-defendant under the indictment."
In his charge to the jury on petitioner's trial, the Trial Judge said: "I think that the Government case must rest or fall on Banning, all of it" (Or. Tr. 437).

[4] Of Banning's character the Court of Appeals said (Tr. 237-38): "Banning was a hijacker, burglar, holdup man, and jewel thief. On Gordon's trial he admitted he had been guilty of repeated perjury as a witness in other trials. He further told of a score of vicious crimes he had engaged in and of various prison terms he had service in different parts of the country."

20 years Federal sentence he was serving, (b) The dismissal of another Indictment for Robbery pending against him at Cleveland, (c) Permission to go at large upon his own recognizance (after Gordon's conviction) despite his plea of guilty to the crime for which petitioner was sentenced to 20 years, and (d) the procurement of a job for him by Government officials.

(3) Further new evidence of appellant's innocence.

(a) Evidence that one Zussman, tried as a co-defendant with Gordon and serving a sentence of 5 years, now entirely exonerates Gordon while implicating himself and stating that he had been unable to testify for Gordon in his trial since by doing so he would have revealed his own guilt.

(b) Evidence that Banning's wife knew of his plan to free himself by accusing Gordon, but had been threatened by an FBI agent with prosecution for "perjury" if she attempted to testify in Gordon's favor on the trial.

(c) Evidence that two other co-defendants, Bernard Sidran and Howard Graves, who had been indicted with Gordon, but who had not been tried with him, since they were incarcerated at the time at the Ohio State Penitentiary, also exonerated Gordon.

(d) Evidence that various and divers favors over a period of 2 years before Gordon's trial had been extended to Banning from which he clearly knew that he could secure immunity if he accomplished the conviction of Gordon,[5] as well as undenied evidence of a bet made with him upon the subject by the FBI agent in charge.

The Government's answer to appellant's petition was filed July 16, 1948. Hearing was had before the Honorable Frank A. Picard on December 7, 1948, and the matter taken under advisement.

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[5] Banning deposed (Tr. 185) that two agents interviewed him several times at Leavenworth and said that they were anxious to get evidence against Meyer Gordon; that they told him that if he would "cooperate" he and his wife would not be convicted for a Fort Wayne jewel robbery, and that if he furnished evidence against Gordon nothing would happen to his wife, and "it would go me a lot of good." This is absolutely undenied.

On petitioner's trial Banning swore positively that he had no ulterior motive in implicating petitioner. He testified:

> "I haven't been promised anything. I haven't been even thinking about it" (Tr. 181). "It is not true that I hoped by giving them that information I could make a deal" (Tr. 181).

The Government argued Banning's supposed lack of material inducement to testify against petitioner. The attorney prosecuting the case said to the jury in his argument, "He" (Banning) "has been promised nothing." Further assurance on the part of the prosecutor that Banning had been promised nothing is quoted in the margin.[6]

After petitioner was convicted, Banning received the following rewards for his testimony against petitioner:

> (a) A pardon from the 20 year Federal sentence he was serving, (b) The dismissal of another indictment for robbery pending against him at Cleveland, (c) Permission to go at large upon his own recognizance (after Gordon's conviction) despite his plea of guilty to the crime for which petitioner was convicted, and (d) The procurement of a job for him by Government officials, (d) As disclosed by Petitioner's

[6] "He asked Banning if he had made any deal, and that implies a deal between the government and Banning in relation to his testimony here, and Banning said no. He asked if he had been promised anything by way of pardon or parole, and Banning said no. And he has been promised nothing. *The day he took that witness stand and all during the time he was in court, he is standing in court under sentence of twenty years. He is facing another twenty years by his plea of guilty to this indictment, and he is facing another ten years in Cleveland.* He has been promised nothing. The fair thing to do is the think we did. He told you about this Akron job. It was investigated by the FBI and they checked on the story as told by Banning with the people who were held up. You heard the story as told you by Mr. Rosfelder and it coincides. *If we had taken the story as we got it from Mr. Rosfelder and taken steps to have Banning exonerated from the twenty-year sentence he is doing by virtue of the testimony of McMann, defense counsel would be in here singing another story, the fact that we let him out of a twenty-year sentence to testify against Gordon, and you can be assured that is what they would have told you. So we did the fair thing.*" (Tr. 38-39.)

motion to Remand, the dismissal of an information for robbery pending at Omaha.

After Banning had thus gained his freedom, he was re-arrested after having robbed several filling stations and shot a policeman. He is now serving 50 to 60 years in a State prison for these latter crimes. (*Present Court of Appeals Opinions,* Tr. p. 333.)

After his re-arrest above mentioned, Banning executed the recanting affidavits that are in part the basis for the instant motion for new trial. In these affidavits he categorically retracts his implication of petitioner. They may be read in full in the record (Tr. 10-14 and 181-190). It is sufficient for any question sought to be raised in this court to summarize them thusly: Banning now says in substance that he did *not* "see Meyer Gordon that day in the Southmore Hotel, as I testified, nor did I have any conversation with him relative to the jewelry stolen from Ollendorff on that day, or any other day." In his third recantation affidavit, executed after he had been sentenced and was serving a term of 50 to 60 years he deposes:

> "the Government intended to have me indicted for a jewel robbery at Fort Wayne, Indiana. They told me that if I would co-operate with them they didn't think that my wife or I would be indicted. I asked them what they meant and they told me that they had been sent to interview me and said that they had been trying to get evidence against Meyer Gordon, a fence in Chicago, for a number of years, and promised me that if *I would furnish evidence to convict him nothing would happen to my wife and it would do me a lot of good.* These men later returned with the same propositions and all in all they visited me three times, each time giving me time to think it over " (Tr. 185). (Italics supplied.)

This last statement of Banning stands absolutely undenied in the record. Further details of the inducements which

he says were given him for his testimony may be read in the transcript at 187 and 188.

Petitioner's motion for a new trial was also supported by the affidavits of Zussman, a co-defendant, tried with Gordon and sentenced to 5 years. Zussman was one of those who had perpetrated the Ollendorff robbery.

According to Zussman, appellant's "name was never mentioned in any conversations I had with Banning before or after the robbery" (Tr. 25).

According to Zussman's affidavit (Tr. 24-25), made after his incarceration and the denial of his appeal, he knew at the time of Gordon's trial that Gordon was completely innocent of any participation in the "Ollendorff" robbery, and knew that the testimony of Banning implicating Gordon was completely false, but was afraid to take the stand in Gordon's behalf to refute Banning's testimony because in doing so he would have to confess implication in the robbery. He further stated he had never heard of Gordon prior to the indictment.

Graves' affidavit was to the same effect (Tr. 41-51).

Thus Banning's testimony, upon which both the District Court and this Court have said appellant's conviction depends, is now impeached, discredited and nullified by his own retractions of the statements whereby he implicated appellant, by his wife's affidavit that he was in contact with a jeweler in Minneapolis at times material to the question of appellant's guilt, and that Banning at that time implicated this Minneapolis jeweler, and by three of his confederates, none of whom were available to appellant at his trial, and all of whom damn Banning's testimony in the trial as rank prejury insofar as it named Gordon as an accomplice in the crimes.

Sidran's affidavit deserves consideration in view of the Trial Court's subsequent secret interview with him at the penitentiary in Ohio. Banning had sworn on petitioner's trial that Sidran drove Banning from Detroit to Chicago and introduced Sidran to petitioner in connection with projected jewel robberies. Sidran was not available as a witness for petitioner on the latter's trial. But his affidavit (Tr. 40-51) positively deposes that he did *not* drive with Banning in an automobile to Detroit and had nothing to do with the robbery.

Banning's wife Julia also deposed in favor of petitioner that she knew of Banning's plan to gain his freedom by convicting the petitioner. She was asked by Banning to "cooperate" and refused. An FBI agent threatened to prosecute her for "perjury" if she testified for Gordon on the trial. The agent in question denied this but did volunteer that it would not be advisable for her to take the stand and give "false testimony to aid the defendant Gordon, because if she did consideration might be given by Federal authorities to prosecution of her for perjury" (see Opinion of Court of Appeals, p. 5).

The District Judge's Visit to the Witness Sidran in the Penitentiary and His Attempts to Confirm or Impeach the Witness' Extra-judicial Statements by Extra-judicial Investigation. His Refusal to Hear Any of the Witnesses in Open Court.

The District Judge who had heard appellant's original trial and who was entertaining the instant motion undertook, without notice to, consent from or the presence of appellant or any of his counsel, to visit the material witness Sidran at the Ohio State Penitentiary, there interviewed him secretly (save for the presence of the Warden),

received statements *exculpatory* of appellant, and then, mistrusting these statements, invoked (still without the knowledge, consent or presence of appellant or any of his counsel) the offices of the Federal Bureau of Investigation in confirming or discrediting Sidran's statements.

The full text of the Judge's recital of this private and extra-judicial inquisition can be read in the Transcript at pages 221 to 223. The Court announced this trip as "news" to everyone (Tr. 220). The Judge sustained correspondence with Sidran and read fragments of this correspondence into the record at p. 222. For the immediate convenience of the Court we reproduce a part of his remarks and his reading of his private correspondence with Sidran:

> "I don't mind telling you gentlemen that this case has disturbed me quite a bit, and it has disturbed me because I don't want to keep an innocent man in jail. And I haven't rested by listening to you and to the District Attorney's office. I went out to get the information myself. I may have taken an opportune time to get part of it, but that is all right, I was going to do it anyway. I also insisted the F.B.I. get the report from Washington that the daughter told me had been filed in Washington. I went through that, took it home over the week end.
>
> Mr. Frederick: May I intrude at this moment with reference to the affidavit of Sidran and Graves, or am I interrupting?
>
> The Court: I want to tell you this: Here is what I wrote to Sidran the other day. **I thought this would be news to you.** Who is the other agent?
>
> Mr. Iseman: I was with you in your office the other day.
>
> The Court: Have I stated everything correctly?
>
> Mr. Iseman: To the best of my knowledge, yes, as it actually happened.
>
> The Court: This is the letter I wrote to Sidran:

"December 2, 1948

Mr. Bernard G. Sidran
Ohio State Penitentiary
Columbus, Ohio

Dear Sir:

When I interviewed you at the Ohio State Penitentiary on November 21, last, in the presence of the Warden, you stated that you could not have participated in the robbery that occurred in Okron, Ohio, August 28, 1940 nor could you have participated in the jewel robbery in Detroit, September 13, 1940 because—you stated—you were 'on a lake trip to Toronto, Montreal and Quebec.'

At your suggestion I contacted the FBI—"

He said, "If you will get that for me, that will prove that Banning is lying." I said, "I know Banning has difficulty telling the truth, but that will certainly help Mr. Gordon if it is true." And I said, "You claim that they aren't getting that. I will see they do get it."

"At your suggestion I contacted the FBI—"

that the two tickets you and your wife purchased were for a trip which started in Detroit, August 20, 1940 and you returned to Buffalo, August 26, 1940. Some of the passengers took the train from Buffalo to Detroit on August 27, 1940 arriving here the same day. So you could have been in Akron on August 28, and you certainly could have been in Detroit on September 13."

He could have been. I don't say he was.

"Incidentally our information also shows that near the end of 1946, your wife called on Mr. Morris G. LaBelle of the Canada Steamship Lines and tried to get him to give her the two tickets which were used by you on that trip. This he refused to do; so at least your wife must have known that it was very possible for you to have been in Akron and in Detroit on the days mentioned.

"If there is any other evidence you can give me I will be very glad to check on it."

It thus appears from the Judges' recital and observations *cf.* his expression "There goes Sidran's affidavit." (Tr.

223), which observation was made in contemplation of material extra-judicially investigated, that the Judge gave weight to his reflections upon his private inquiry thus undertaken (See also Tr. 224).

The Trial Judge's Refusal to Hear Witnesses in Open Court.

Upon appellant's original motion, and again in his reply to the government's answer, appellant requested the Court, in the event that doubt arose in his mind concerning the integrity of the affidavits attached to the papers, that all of the material witnesses be called into open court and cross examined by both sides and by the Court concerning the facts. As evidenced by his own expressions (Tr. 209, 221), the various materials presented by the defendant's motion did indeed raise grave doubts in the Court's mind. Nevertheless, the Court although interviewing Sidran privately, summarily *refused* to call into court any of the witnesses who might have shed light upon the situation.

The opinion of the Court of Appeals states that the Judge undertook this extra-judicial investigation at the instance of petitioner's daughter. The Court of Appeals is inadvertently mistaken. Nothing in the record supports this statement.[7] The record does show that petitioner's daughter did take it upon herself to visit the Judge and ask him to call for an FBI report that had been suppressed. But, of course, the point is immaterial. But of course the Trial Judge would have no more right to make this judicial excursion at the request of petitioner's daughter than he would have to undertake it *sua sponte*.

[7] The trial court expressly admitted (Tr. 275) that the daughter had not requested him to go to Columbus. She had requested that he examine certain suppressed FBI reports. This he did and found that Banning had as petitioner's daughter claimed, repeatedly told FBI agents he had lied on the Gordon trial (Tr. 293).

The Order Denying the Motion for New Trial.

The District Judge denied appellant's motion for a new trial by memorandum order (Tr. 245).

In thus ruling the Trial Judge, according to his remarks in the record, drew an illicit inference from appellant's failure to testify in the trial (Tr. 231-234).

Appellant's Motion to Vacate the Order Denying a New Trial, that the Judge Disqualify Himself, and for Re-Assignment of the Motion to Any Other Judge in the District.

On December 28, 1948, the day succeeding notice to his counsel of the overruling of the motion for a new trial, appellant filed his verified Motion for an Order Vacating Judgment, having this Court Disqualify Himself, and for Reassignment of Cause to Any Other Judge in the District (Tr. 246-252). In substance this motion stated the facts summarized above with respect to the District Judge's extra-judicial investigation, specifically averred that it was without notice to or consent of appellant and asserted the contention argued on this appeal, viz., that the Judge, by deliberately undertaking to investigate the case in the manner above described, had disqualified himself from deciding appellant's motion.

From the government's answer it appears that there were letters written from the Judge to the United States Attorney's office concerning the evidence in this case while the motion for new trial was pending (Tr. 259-260).

The District Judge after extended colloquy (Tr. 270-304) denied this last motion of appellant (Tr. 304).

Appellant appealed from the order denying him a new trial (Notice of Appeal, Tr. 245) and from the order denying the appellant's motion to vacate the order denying a new trial and asking that the Judge disqualify himself (Tr. 305).

The Trial Judge made the following findings in denying the motion for new trial:

At the hearing on December 8, 1948, in this regard the Trial Judge stated (Tr. 203-204):

> "Banning as I remember, said that he went to the hotel, he actually saw Gordon up in the room when they had the jewels and made the bargain with them in that room. **If that testimony hadn't been here, Gordon could never have been convicted. I don't think I would even let it go to the jury because if he hadn't seen the man, there was no connection of Gordon with this case, except that incident in the hotel.**" (Emphasis supplied.)

At the same hearing (Tr. 231) the court recognized the devastating effect of the Banning recantations by stating:

> "**There couldn't be a jury in the world found now to believe Banning, and anybody that knows anything above trials knows that.** Nobody would believe Banning now, no jury would. I don't say nobody, but no twelve men would believe Banning now. So if I let Mr. Meyer Gordon out, I let him out. **If there is a new trial, there isn't a chance of [his] ever being convicted.**"
>
> "Mr. Frederick. By the same token and by the same line of reasoning, why should you believe Banning's testimony when given on the witness stand here vilifying or convicting Gordon, and disbelieve the recantation which has now been made?
>
> The Court: I didn't necessarily believe Banning.
>
> Mr. Frederick: The point is it is up to the jury.
>
> The Court: I have never at any time said I believed Banning, have I, at any place?"

While the petitioner's appeal was pending in the Court of Appeals it was discovered that the Government had given

Banning another reward for his testimony against the petitioner, in that after petitioner's conviction the United State's Attorney at Detroit had requested the County Attorney of Omaha, Nebraska, to dismiss an information for robbery pending against Banning in that jurisdiction, and in so doing had represented that Banning had been "useful" to the Government in convicting Meyer Gordon. The dismissal on its face showed it was done "at the request of the United State's Attorney at Detroit" (Tr. 317).

This was formerly denied, but the Government's own affidavits (Tr. 322 to 329) showed that the prosecutor requested the dismissal "in view of the active cooperation given to the Government by Banning". Demand was made upon the Government to produce the correspondence. This was refused. Petitioner requested the Court of Appeals to compel the disclosure of the correspondence and motion made to remand the case to the District Court for a reconsideration of his original motion in the light of this new evidence. This motion was summarily denied without opinion January 3, 1950 (Tr. 345).

SUMMARY OF ARGUMENT.

I.

The District Court's Findings That No Jury Would Now Convict Petition and That The Trial Judge "Did Not Necessarily Believe Banning" Entitled Petitioner to A New Trial as a Matter of Law.

Other Cases to the Same Effect.

II.

The Trial Judge's Secret Interview of a Witness and His Private Consultation of FBI Agents Should Evoke Certiorari and Reversal.

III.

Petitioner Was Entitled to a Vacation of the District Court's Judgment Because of the Evidence Discovered After the Trial Court's Decision and Suggested to the Court of Appeals.

IV

The Total Complex of Facts in This Case Evinces A Denial of Due Process and Should Elicit Certiorari.

ARGUMENT.

I.

The District Court's Findings That No Jury Would Now Convict Petitioner and That the Trial Judge "Did Not Necessarily Believe Banning" Entitled Petitioner to a New Trial as a Matter of Law.

The case of *Griffin* v. *United States,* 336 U. S. 704, decided while this case was *sub judice* in the Court of Appeals, is of the utmost significance. We therefore address that case immediately.

In the *Griffin* case a motion for a new trial was made after conviction of murder on the ground of newly discovered evidence, viz., the presence of an open knife in the pocket of the decedent.

All of the then Justices of this Court voted in favor of reversal. In an opinion concurred in by four other Justices, Mr. Justice Frankfurter for the majority reversed and remanded the case to the Circuit Court of Appeals for a determination of the question whether, under the law of the District of Columbia, evidence of "uncommunicated threats" were admissible. The majority were of the opinion that the Court of Appeals must first address itself to this issue of admissibility

> "in order to *rule out the inference* that the Court of Appeals may, in applying *U. S.* v. *Johnson,* 327 U. S. 106, *have deemed the denial of a motion for a new trial on the basis of newly discovered evidence solely a matter for the Trial Court's discretion.*"

The court further said:

> "Were the Court of Appeals to declare that the controverted evidence was admissible according to the

law prevailing in the District *it would have to consider further whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it.*" (Emphasis supplied.)

Justices Vincent, Murphy, Douglas and Rutledge were in favor of summarily granting the motion for a new trial stating that

> "a contrary determination would be an abuse of discretion *for there is manifestly a reasonable possibility that the jury would lessen the verdict of first degree murder.*"

It is also of extreme significance that in its brief in opposition to Griffiin's appeal the Government itself, after first stating that it is well settled that the granting or denial of a motion for a new trial on the ground of newly discovered evidence is a matter resting within the sound discretion of the Trial Court, and in the absence of manifest abuse of such discretion is not reviewable on appeal and after stating that in exercising its discretion the Trial Court should be guided by the rule, among others, that the newly discovered evidence relied on must not only be material to the issues that were involved at the time, but such that its consideration by a jury at a new trial would probably result in a different verdict, then concedes as follows:

> "However, where the offense in question *is of a serious type,* and particularly in a capital case, *we believe that the rule as stated may place too heavy a burden on the defendant who moves for a new trial on the ground of newly discovered evidence, and that the proper rule should be that the newly discovered evidence relied on must be such that there is a* **reasonable possibility** *that its consideration by a* **jury** *at a new trial would result in the return of a different verdict.*" (Page 21, Brief for the United States, *Griffin* v. *U. S.*, October Term No. 417.) (Emphasis supplied.)

And so the proper test, as the government conceded and as all nine justices held, was not whether the *Court* believed the newly discovered evidence, but whether there is a *"reasonable possibility"* that its consideration by *a jury* at a new trial would result in a different verdict.

Now let us apply this standard to the instant case: The District Court has emphatically stated (Tr. 231) that "now no jury would believe Banning." Once the District Court reached this conclusion of fact, appellant's right to a new trial became not a matter of discretion, but automatic and absolute for not only was there a *"reasonable possibility"* that a new jury would acquit, but according to the trial judge, it was a foregone conclusion that they would do so.

Furthermore the proof is *absolutely positive that Banning* lied *on the vitally important point of whether he was testifying for material inducements. There is no evidence to the contrary.* The many favors shown Banning leave no doubt upon this point. The pardon received by him in the *Weiss* case, the dismissal of the Cleveland indictment, the failure to sentence him in the instant indictment, the procurement of a job for him by the government after the government had obtained his release, stand unexplained and uncontradicted in this record.

Therefore, even if the Trial Court had made a finding that Banning told the truth when he disclaimed personal inducement for implicating appellant, that finding would have been totally unsupported by any evidence. But, of course, the Trial Court made no such finding. As a matter of fact the court expressed his entire disbelief in the Government's ridiculous assertion that all this *largesse* had no connection with Banning's trial testimony (Tr. 235-236), saying he "was not naive enough" to believe it (Tr. 236).

Other Cases to the Same Effect.

The Court of Appeals for the Sixth Circuit held in the case of *Helwig* v. *U. S.*, 162 F. (2d) 837, as did the Court of Appeals for the Third Circuit in *U. S.* v. *Ward*, 168 F. (2d) 226, that the *criterion* for adjudication on motions such as this one is whether a *jury* would or reasonably might be expected to acquit in the light of the evidence adduced on the motion. Similarly in *Cleary* v. *United States*, 163 F. 2d 748, C. C. A. 9, it was held that if the evidence, so claimed to show the alibi, was actually newly discovered, it was a matter for the jury and *not for the Judge to consider its weight against the testimony of the complaining witness.* The court affirmed denial of the motion because it found that the evidence was not "newly discovered". See also *Martin* v. *U. S.*, 17 Fed. (2d) 973, at 976 (C. C. A. 5); *Pettine* v. *The Territory of New Mexico*, 201 Fed. 489 (C. C. A. 8); *U. S.* v. *Miller*, 61 Fed. Supp. 919.

A different criterion was suggested by Cardozo, J., when he presided over the Court of Appeals in New York. *People* v. *Shilitano*, 218 N. Y. 161, 112 N. E. 733. That great jurist said:

> "The court was not at liberty to shift upon the shoulders of another jury his own responsibility, but was charged with the responsibility to seek the truth himself."

This statement, despite the eminence of the Judge who uttered it, is in conflict with the pronouncement of both the minority and the majority in the *Griffin* case. But even if it be accepted as furnishing the standard for the Trial Judge in petitioner's case, petitioner is entitled to a reversal; for the Trial Judge said that he "did not necessarily believe Banning's trial testimony" and therefore

either did *not* "seek the truth himself" or if he did, he must have disregarded what he found to be the truth.

Other cases declaring that it is the Judge's belief or disbelief of the witness, not his conception of what a *jury* would believe or disbelieve, are *Cobb* v. *U. S.*, 6 Cir. 161 Fed. (2d) 814; *Blodgett* v. *U. S.*, C. C. A. 6, 161 Fed. (2d) 47. But, as we indicated above, even under this test, petitioner is entitled to a reversal.

Thus there is important diversity of authority as to the criterion which must guide a judge on motions for new trial for newly discovered evidence.

II.

The Trial Judge's Secret Interview of a Witness and His Private Consultation of FBI Agents Should Evoke Certiorari and Reversal.

In this Court's recent decision in *Williams* v. *New York*, 337 U. S. 241, this Court, *speaking specifically of extra-judicial evidence not comprising a part of the record*, said:

> "Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations."

The Court held, however, that informal inquiry might be made as to a convicted person's background for the purpose of sentencing him. But the Court said in a footnote:

> "Courts have treated the rules of evidence applicable to the trial procedure and the sentencing process differently."

The facts constituting the Judge's extra-judicial investigation of petitioner's case (1) by his interview with Sidran and (2) by his requesting the FBI to check Sidran's claim

of an alibi have been fully narrated in the Statement of Facts, immediately *ante*. They will not be repeated here.

Inherent in the "concept of ordered liberty" which is the essence of due process is the principle, far better established by inveterate tradition than by precedent, that a court must base its judgment upon materials adduced in open court and preservable in the record. (See *Downey* v. *U. S.*, 91 Fed. (2d) 223.)

This Court refuses to take cognizance of matter which an indigent prisoner, without counsel, physically appends to the transcript in the form of undenied affidavits that were not filed in the Trial Court and hence are not properly part of the record. *Carter* v. *Illinois*, 329 U. S. 173, 67 S. Ct. 216, 91 L. Ed. 172. It should therefore disapprove the egregious departure from judicial norms committed by the Trial Court in this case.

There is a direct conflict between the *rationale* of the opinion in the instant case and the declarations of the Supreme Court of Illinois upon the question whether an extra-judicial inquiry by the Judge on a motion for a new trial announced *per se* the denial of due process of the law.

In *People* v. *Cooper*, 398 Ill. 468, one Dorothy Cooper had been convicted of murder. The Trial Judge, while a motion for a new trial was under advisement, "expored the background of certain of defendant's character witnesses and then, pending disposition of the motion for a new trial, the Trial Judge took a view of the premises where the homicide occurred." The Supreme Court of Illinois, reversing, said at page 472:

> "In short, any private investigation by a court pending a motion for a new trial constitutes a denial to the defendant of the constitutional guarantee of due process of law."

In so holding, the Illinois Court followed its previous decision in *People* v. *McGeoghegan*, 325 Ill. 337. In that case, "'The trial court expressed grave doubts as to Fernekes' participation in the crime, and in order to determine the credibility of Fernekes' alibi witnesses sent an investigator to the State of Indiana.'" This investigator reported favorably to Fernekes, that his, he reported that the character witnesses whom he had investigated appeared to be responsible people. Nevertheless the Trial Court denied a new trial. The Supreme Court reversed, not because the Trial Court failed to give weight to the favorable report of his emissary, but because, so the Court held, it denied fundamental rights to conduct an extra-judicial investigation in a motion for a new trial regardless of results.

The Court of Appeals said that petitioner was not prejudiced by this excursion of the Trial Judge. But the Trial Judge himself, after having consulted FBI agents in connection with the results of his excursion stated into the record, "There goes Sidran's affidavit" (Tr. 223).

The very paucity of precedents upon this important question is eloquent. Almost never do judges make private excursions from their court rooms to "investigate" the facts in litigation pending before them by talking in private with witnesses. Yet, if such investigation were a licit judicial technique, it would be employed with the greatest frequency. But such cases as there are on the point generally hold it to be reversible error for a Trial Court without notice to the parties to conduct a private and extra-judicial investigation upon which, either in whole or in part, he may base his judgment. For the Court's convenience we collect and discuss these authorities in the margin.[8]

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[8] *Downey* v. *United States* (Court of Appeals for the District Court of Columbia) 91 Fed. 2d 223, is very pertinent. In that case a Trial Judge, confronted with sentences that he had imposed some four years

One of the paramount considerations interdicting this practice is that where a Trial Judge resorts to extra-judicial investigation, no record is preserved for that appellate scrutiny which is guaranteed by the laws of the United States and of the various States in criminal cases.

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before and that were ambiguous as to whether they were to run concurrently or consecutively, resorted to (1) his personal recollections and (2) to letters that he had received from the prisoner's family.

Based upon his personal recollections and the letters from the prisoner's family, he amended the language of the sentences so as to make it clear that they were to run consecutively.

The Court of Appeals held that consultation of extrajudicial material, viz., the judge's personal recollections and letters from the prisoner's family, was "too informal to insure fairness and accuracy, and too informal for review" and so constituted reversible error.

The Court of Appeals said:

> "In the determination of the question of fact involved, that is, the question whether the sentences as originally uttered were concurrent or consecutive, the justice, to the extent that he relied upon his own recollection and referred to circumstances and letters, was sitting as both judge and witness, and as witness he gave no evidence, in the legal sense."

The Court further said:

> "Documentary data referred to by the witness, such as the letters here, would have been produced and offered in evidence, subject to the scrutiny and possible objection of counsel."

Likewise in *Valentine* v. *Malone*, 269 Mich. 619, where the court, while hearing the case without a jury, went to the scene of an accident without the consent of either party to view the operations of a stoplight and drew therefrom certain conclusions upon which in part his judgment was based, the Court in reversing stated:

> "We still have in most things the controversial method of trial. If and when we adopt the inquisitorial method the court may, perhaps, without error make personal investigations and arrive at conclusions based thereon in disregard of the evidence adduced in court. The trial court was in error in arriving at the conclusion based upon his personal observations and not upon the testimony."

In this case it was pointed out where such methods are pursued there would be no way to review findings or verdicts based upon the weight of the evidence because no one could know the weight given to the evidence in court and to the personal observations based on inquisitorial investigation.

See also *People* v. *Cooper*, 398 Ill. 468; *Valentine* v. *Malone*, 269 Mich. 619, at 627-632; *Rowland* v. *Commonwealth of Ky.*, 243 S. W. 1055, 195 Ky. 802; *Richardson* v. *State*, 12 S. W. 870, 28 Tex. App. 216; *Denver Omnibus & Cab Co.* v. *J. R. Ward Auction Co.*, 47 Cal. 446; 107 Pa. 1073; 19 Ann. Cases 577; *Stephenson* v. *State*, 28 Ind. 272; 23 C.J.S. Par. 4192; 97 A. L. R. 326; 3 *Jones Comm. on Ev.* Par. 1409, page 2567.

We submit that the Trial Court's extra-judicial investigation in this case should evoke *certiorari* and reversal.[9]

III.

Petitioner Was Entitled to a Vacation of the District Court's Judgment Because of the Evidence Discovered After the Trial Court's Decision and Suggested to the Court of Appeals.

In the Statement of the Case, *ante,* we have explained how petitioner discovered after the Trial Court's decision positive evidence that the United States Attorney who prosecuted him requested a State Prosecuting Attorney in Nebraska to dismiss robbery charges pending against Banning in that State representing that Banning had been "useful" to the Government in prosecuting the petitioner.

This discovery was suggested to the Court of Appeals by petitioner's motion to remand (Tr. 310). The Court of Appeals denied this motion without opinion.

United States v. *Johnson,* 327 U. S. 106, recognizes the propriety of a motion to remand, addressed to the Court of Appeals while the case is pending in that Court, upon

[9] The Court of Appeals made an inadvertent misstatement of fact to the effect that the Trial Judge undertook his visit to Sidran at the behest of petitioner's daughter. In this the Court was in error. The Trial Court expressly admitted (Tr. 275) that the daughter had not requested him to go to Columbus. She had requested that he examine certain suppressed FBI reports. This he did and found that Banning had, as petitioner's daughter claimed, repeatedly told FBI agents he had lied on the Gordon trial (Tr. 293). The Trial Court said, "So I got the report from Washington and found out she was telling the truth" (Tr. 293). Nowhere is it suggested that petitioner's daughter requested the Trial Judge to interview Sidran at the penitentiary.

But the point is really not important. The petitioner's daughter, though motivated by the understandable solicitude for her father's welfare, had not authority to request the Trial Court to undertake any such excursion as this one. Certainly the Trial Court would have no authority to accede to such an importunity if it had been made, which, however, it was not.

the ground of evidence discovered since the Trial Court's decision.

Fairness to this Court compels us to grant that if this record were otherwise free of the grave errors already argued, this action by the Court of Appeals, however unjust it might be to petitioner, might not be of sufficient importance to elicit this Court's discretionary grant of *certiorari*. But when this summary action is considered in the light of the Court of Appeals' opinion sustaining the denial of petitioner's motion for new trial notwithstanding the Trial Court's explicit findings in his favor and its refusal to reverse notwithstanding the Trial Court's secret interview of the witness Sidran, this final refusal of the Court of Appeals to heed the very substantial merits of petitioner's ought, we think, to persuade this Court to grant certiorari if it is not already so persuaded by the considerations heretofore developed.

IV.

The Total Complex of Facts in This Case Evinces a Denial of Due Process and Should Elicit Certiorari.

Credence in Banning's testimony was essential to petitioner's conviction. Both the Trial Court and the Court of Appeals have so declared.

At the time of petitioner's trial, Banning swore positively that he had no ulterior motive in incriminating petitioner. It now appears without contradiction that before Banning testified, FBI agents at Leavenworth had three times attempted to persuade him to cooperate by promising him that "it would do him a lot of good" and that he and his wife would not be indicted at Fort Wayne. It is also uncontradicted that for two years before petitioner's trial,

Banning had been given extraordinary privileges, summarized in the margin.[10]

These facts were known to the Government at the time of petitioner's trial but were unknown to petitioner. Nevertheless the Government's counsel not only permitted Banning to swear that he had been neither given nor promised inducements for incriminating petitioner but argued Banning's alleged disinterestedness to the jury (Tr. 38-39).

Petitioner was deprived at his trial of the testimony of the witnesses Zussman, Sidran and Graves because the latter two were in the Ohio State Penitentiary, beyond the reach of subpoena, while Zussman, though tried with petitioner, claimed his privilege against self-incrimination and refused to testify. All of these witnesses are now prepared to exonerate petitioner.

The Trial Judge, although willing to interview Sidran privately, refused to hear any of these witnesses in open court himself. He likewise refused to hear the testimony of William Comb, a member of the Detroit Bar, who was willing to testify that he had received a letter voluntarily written by Banning in which Banning confessed his perjury on the trial (Tr. 192-193). Nor would the Trial Judge permit a jury to hear these witnesses.

It now appears that since petitioner's conviction upon Banning's testimony, Banning has received the many rewards heretofore enumerated. The Trial Judge has stated that he was "not naive enough to believe" either that Banning did not expect such rewards when he testified or that

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[10] Banning deposed (Tr. 186) that for two years while he was at the West County Jail he regularly, while being interviewed, was given steaks prepared at a Detroit Club; that he had various privileged positions such as running the elevator, running the jail store, and taking charge of the main gate to the jail. Additionally, it is uncontradicted that Agent Johnson, in charge of the FBI investigation, made a bet with him that if he convicted Gordon he would be on the street (Tr. 187—See Opinion of Court of Appeals Tr. 337-338).

the Government did not expect him to get them (Tr. 235-236).

The Trial Judge, after recognizing that Banning's testimony was essential to petitioner's conviction, has found and declared that no jury would now convict petitioner and that he himself did not necessarily believe Banning. The totality of these facts evinces such a denial of due process of law as to call for certiorari and reversal.

Conclusion.

For the reasons apparent on the record, suggested in the instant petition and urged in this Brief, we respectfully submit this Court should grant certiorari in this case and should reverse the judgments below.

Respectfully submitted,

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